

- (1) Although claimant notified respondent of the accident beyond ten (10) days of its occurrence, notice was timely as just cause existed and extended the period of notice to

seventy-five (75) days. For accidents occurring after July 1, 1993, K.S.A. 44-520 provides that claimant must notify respondent of the accident within ten (10) days of its occurrence, unless respondent possessed actual knowledge of the accident or failure to notify within ten (10) days was due to just cause.

In this proceeding, claimant was not initially aware she had sustained accidental injury on the job. Claimant did not experience a single, traumatic event, but merely began to experience pain in her side and back after moving boxes of frozen chickens on or about June 9, 1994. Thereafter, claimant's symptoms increased through her last day of work on July 6, 1994. Although claimant advised her supervisor that her side and back were hurting, she failed to relate her symptoms to her work. Upon her supervisor's suggestion, claimant sought medical treatment through a charitable organization. Claimant obtained a doctor's appointment for July 5, 1994, and the doctor advised her she had either a gallstone or kidney infection. The earliest date in the medical records that indicates claimant's symptoms might be related to physical injury at work rather than kidney problems is July 21, 1994. Claimant's lack of knowledge that she had sustained a work-related injury, coupled with the doctor's misdiagnosis of the medical condition, constitutes just cause for failure to notify the respondent of the accidental injury within ten (10) days of its occurrence.

Because just cause existed, claimant had seventy-five (75) days from the date of accident, or until September 19, 1994, to provide notice. Notice was timely as claimant wrote respondent on August 31, 1994, to request workers compensation benefits for this injury. Also, claimant served written claim on respondent on September 7, 1994, which is also within the seventy-five (75) day period.

(2) Because the evidence is uncontroverted that claimant continued to perform her regular job duties and experienced increased symptomatology of pain through her last day of work, the date of accident in this proceeding is July 6, 1994. That is the date shown in the time records introduced into evidence as claimant's last day of employment with respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order and Nunc Pro Tunc Order of Administrative Law Judge Nelsonna Potts Barnes, dated October 28, 1994 and November 3, 1994, respectively, are modified with respect to the date of accident, but otherwise remain in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of January, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBERDISSENT

I respectfully dissent from the opinion of the majority of the Appeals Board in the above matter. The Appeals Board finds claimant suffered an injury arising out of and in the course of her employment through her last day employed being July 6, 1994. The Appeals Board found claimant did not experience a single traumatic event but merely began experiencing pain in her side and back after moving frozen boxes on or about June 9, 1994. This finding is not supported by the evidence. The incident on or about June 9, 1994, was sufficiently significant to the claimant to cause her to not only mention the incident to two of her co-workers but to additionally comment that she should not be required to lift so much by herself. Testimony indicates claimant not only knew the significance of the problem on June 9, 1994, but related it specifically to the unloading at work.

The finding of an injury through July 6, 1994, is unsupported by the evidence as claimant testified to a specific onset of pain on a specific date. While this "pain" continued and did worsen, there is no medical evidence in the record to show that claimant's condition worsened after the initial onset.

Even accepting a July 6, 1994 injury date, claimant failed to provide notice to the respondent of the injury within ten (10) days and has further failed to prove "just cause" for this failure as required in K.S.A. 44-520. Claimant's awareness of the timing of the onset, as well as the activities involved at the time of the onset, defeat claimant's allegation that she was unaware of the work-related nature of her pain. Further, the July 21, 1994 medical report of Dr. White states claimant felt there was a connection between her back pain and her lifting chickens at work. Even after providing this information to her treating physician, claimant failed to advise respondent of the alleged back injury during her July 28, 1994 telephone conversation with her supervisor.

The majority of the Appeals Board appear to support the contention that notice under K.S.A. 44-520 need not be given until a diagnosis of claimant's condition is made. This opinion is not supported by a reading of the statute. The notice required under K.S.A. 44-520 must be given within ten (10) days of the **accident**, not within ten (10) days of the diagnosis.

The first indication that claimant notified respondent of her alleged back injury comes in the form of a letter from claimant's attorney dated September 2, 1994, received September 6, 1994. This letter is more than seventy-five (75) days beyond the initial onset of pain on June 9, 1994. Should June 9, 1994, be deemed the appropriate injury date, claimant's claim is barred by the provisions of K.S.A. 44-520. Should an injury date of July 6, 1994, be found, even though contrary to the weight of the evidence, it would be claimant's burden to prove "just cause" for having failed to provide respondent with notice of this alleged injury. Claimant's comments to her co-workers on or about June 9, 1994, regarding the onset of pain, as well as her comments regarding the improper workload requirements placed upon her by the respondent, defeat claimant's contention that she was in some way unaware of the work-related connection to her back pain. Claimant has failed to prove "just cause" for this late notice.

It is this Board Member's opinion that claimant has failed to prove notice to the respondent as required by K.S.A. 44-520 and has further failed to provide just cause for this lack of timely notice.

BOARD MEMBER

c: David L. Nelson, Wichita, KS
Lyndon W. Vix, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
George Gomez, Director